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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 80

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

RHODES PHARMACAL COMPANY, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

STATEMENT.

Apart from emphasis, respondents cannot say that the Federal Trade Commission's statement of this case (Br. 3-11) is inaccurate. Their major criticism of such statement is that it stresses the content of certain advertising representations of respondents not here in issue and completely irrelevant to present considerations. Respondents were enjoined from making most of those representations, before administrative hearings were completed, *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 7 Cir., 1951, 191 F. 2d 744, and have lived under that injunction

ever since. The Commission's order subject hereof likewise prohibited most of the challenged advertising (R. 958-959), and only one paragraph of that order is here for review, a prohibition against advertising claims to the relief of the pains and symptoms of rheumatism and arthritis. Consequently such advertising is all that is here involved.

Respondents sell a drug product "Imdrin," in commerce, as that term is defined in the Federal Trade Commission Act. They advertise it in newspapers and on the radio.

The Federal Trade Commission brought administrative proceedings against respondents, charging that their said advertising was deceptive, in violation of the Act.

After protracted hearings, the Commission found that, while respondents so promised purchasers, "Imdrin" would not, among other things, cure rheumatism or arthritis or provide adequate, effective, or reliable treatment for, or arrest the progress or correct the underlying causes of any such conditions. The Commission ordered respondents to cease and desist from making such claims *to therapeutic effect*. Such orders are not here in issue.

The Commission also found that "Imdrin" would afford only *temporary and partial relief of minor aches and pains* of rheumatism and arthritis, and accordingly ordered respondents to cease and desist from representing that "Imdrin" would afford any greater relief.

On review, the Court of Appeals for the Seventh Circuit, 208 F. 2d 382, 387 [7-9], said that "the findings of the Commission are supported by substantial evidence" (R. 979), but also, at p. 388 (R. 980), that:

> "It was overwhelmingly established in the case at bar that Imdrin affords relief for the pain and discomfort incident to many rheumatic and arthritic conditions. That duration of time that such relief was

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afforded differed with the individuals who used Imdrin. * * *"

The Court further found that the order of the Commission which would require respondents to advertise "Imdrin" as affording only "temporary" pain relief was "indefinite or ambiguous" (R. 979) and of "uncertain meaning" (R. 980), and that reference to "temporary" in the order should be "eliminated" (R. 979). Accordingly, the Court of Appeals modified the Commission's order so as to prohibit respondents from advertising only that "Imdrin" will afford any "permanent" relief of the aches and pains of such conditions (R. 980, 981), or "cure" the symptoms.

The Court of Appeals denied the Commission's petition for rehearing, and this Court granted certiorari. 348 U. S. 812.

SUMMARY OF ARGUMENT.

I.

Two courts of appeal agreed that the Commission's order here in issue was "ambiguous" and undesirable; the District of Columbia Court thought that respondents would not know how to comply with it; the Court below said it might require respondents to advertise that "Imdrin" would provide only "temporary" relief of arthritic pain, and that this term was of "very uncertain meaning" and its use unnecessary to protect the public.

Respondents could not know how they were expected to satisfy the order, specifically, whether they would be obliged to use the word "temporary" in their advertising or not. The Commission has vacillated in its interpretations as to how respondents could comply. It has said both that respondents can represent that Imdrin will give only temporary relief and that the order does not require them to do so. Neither the Commission's explanations nor its findings will alleviate this ambiguity. Practically, respondents must risk contempt proceedings to comply. Moreover, should they elect to comply by using the word "temporary", it will be misunderstood by the public and its use will unjustly prevent respondents from advertising the truth, that Imdrin will provide pain relief of different duration to different individuals.

The use of the term "temporary" [pain relief] is unnecessary to protect the public from deception. It is splitting hairs to attempt to distinguish between relief that is "not permanent" and that which is temporary. We are not concerned with the fact that the Commission's experts used the term in testifying to what Imdrin could do.

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That is not the equivalent of stating the impression which the term might give an ordinary buyer, which is the proper standard. Many of these might erroneously suppose that the relief afforded all persons would be only a few minutes. This would prevent respondents' advertising the truth.

Courts have avoided the use of such relative and indefinite terms as "temporary" in advertising, wherever possible. In most instances where they have approved orders which *happened* to contain such adjectives, no objection was raised. In the cases relied on by the Court below, it rejected the use of "temporary" for good reason.

Nor can it be said that the Commission could not frame an appropriate order not including the term "temporary" on account of the shortcomings of our language. It suggested other phraseology to the Court of Appeals on petition for rehearing, and both that Court and the one for the District of Columbia drafted alternative orders not requiring the use of the objectionable term, a total of four possibilities. Our language is not that impoverished.

And despite the fact that the Commission may have issued orders containing the word "temporary" in some fourteen cases, this Court has never hesitated to reverse the Commission, if it was wrong. It has reversed three concurring agencies, where thousands of cases, involving millions of dollars, had been closed.

The Court below relied on its previous decisions in *D. D. D. Corp.* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679 and *Carter Products, Inc.* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821, which were clearly right. Petitioner now, for the first time, claims they were wrong, instead of attempting to distinguish them on the facts from this case. It cannot be seriously denied that "*relief* [from itching] could * * * carry no implication to the public that the product was a permanent cure for the

symptoms * * *." Even the dissenting judge agreed on that point. Neither can it be contended that the word "temporary" does not "carry an uncertain meaning" or that "to require its use would serve no purpose in the protection of the public, but might limit [respondents] in truthfully representing [their] product."

Neither *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, nor *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, cited by petitioner, are apposite. We have no quarrel with the proposition that a Commission order must be reasonably specific in telling a respondent what he must do, but that is not to say that every ambiguous order is sufficiently specific. And even if respondents knew certainly how to comply, the order would be ambiguous to a potential buyer. The Commission admits its order is indefinite. We believe it too vague to stand. The Court below properly rewrote it.

II.

We disagree with the Commission's contention that the Court of Appeals could not rewrite its ambiguous order so as to reduce its scope of relief. Respondents concede that the Commission has discretion initially to select the remedy and that courts are reluctant to disturb that choice if the agency has made an "allowable" judgment. But respondents insist that this does not preclude judicial review, and the Commission admits that it may be reversed if its remedy bears no reasonable relation to the evil found to exist or is unduly harsh or burdensome.

Petitioner's misconception stems from an erroneous idea that it is an inflexible rule that courts will not substitute their judgments for those of the "responsible" agency. This is untrue. Courts frequently do so, and they must where they find no "rational basis" for the agency's act.

This Court has done so on numerous occasions, as have the courts of appeal. This Court's substitution of judgment for that of the agency has extended to the selection of the remedy. There is no way to reconcile the holdings in those cases in which it has substituted its judgment for that of the agency with those in which it has refused to do so other than on the basis of *judicial discretion.* Residual judicial discretion in proceedings of an equitable nature is entirely proper. There is a wide margin for judicial discretion in making the choice between substitution of judgment and examining for "rational basis."

A remedy selected by the Commission is not rational or reasonable simply because it prohibits an unlawful practice. It must not go further than necessary to curb the evil or be harsh or burdensome. The Court below found the order here in issue unnecessary and thus without rational basis.

While the Commission has always insisted otherwise, complete restraint is not always necessary to the protection of the public. This Court has so decided.

The Court of Appeals modified the order in a manner which *sufficiently* preserved the Commission's justifiable intent. It cannot be true that unless the Court can redraft a Commission order so as to effectuate completely the Commission's intent, proper or improper, it is precluded from making any possible revision in the order. That is too narrow a construction of the statutory authority to "modify". Neither is repeated remand to the agency required, where the Court sees that the agency has considered and unjustifiably rejected a less severe remedy. The Court's qualifications are equal to those of the agency in this field of agency competence. The moral concept of an unfair order is within quick judicial grasp.

The Court below found, in effect, that the Commission's order was unduly harsh, since it unnecessarily prohibited

respondents from advertising the truth. This is an unjustified interference with the lifeblood of their business, which is as much a vested property right as the right to use a trade name, *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, or a sales plan, *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441. Consequently the Court's modification was proper.

ARGUMENT.

The Federal Trade Commission ordered respondents to cease and desist from advertising, *inter alia*, that their drug product, "Imdrin", would "afford any relief * * * in excess of *temporary* * * * of * * * [the] * * * pains" of arthritis or rheumatism. (R. 959.) The Court of Appeals for the Seventh Circuit modified the order by deleting the word "temporary" and prohibiting respondents instead from representing that "Imdrin" would "afford any *permanent* relief of [such] pains * * *." (R. 981.) [Emphasis supplied.]

Petitioner now argues that the judgment of the court of appeals, in so far as it modified this part of paragraph 1(c) of the Commission's order, should be reversed, for two reasons: (1) because the word "temporary" in said order was not "indefinite" or "ambiguous" enough "to require its elimination";[1] and (2) because the court below "erred in modifying the [ambiguous] order in a way that substantially reduced the scope of the relief prescribed by the Commission."[2]

I.

THE COMMISSION'S ORDER WAS SO AMBIGUOUS IT REQUIRED MODIFICATION.

The term "temporary" in the context of this case was too ambiguous, indefinite, uncertain and vague to be retained in the Commission's order. The literal terms of the order also leave doubtful and uncertain whether or not respondents must use the term "temporary" in their

1. Brief for Federal Trade Commission, p. 15.
2. Brief for Federal Trade Commission, p. 26.

advertising in order to comply with the Commission's order.

Not only did the Court of Appeals for the Seventh Circuit characterize the word "temporary" in the Commission's order as "indefinite", "ambiguous" and "of * * * very uncertain meaning" (R. 979-980); the Court of Appeals for the District of Columbia Circuit agreed that its use in a substantially identical order[3] "leaves an undesirable ambiguity" requiring modification.

The Commission itself concedes that a requirement for the use of the term "temporary" in advertising representations is "indefinite as to the duration of the effectiveness of the preparation." (R. 965). But it has said, at various times:

> (1) "Such a requirement * * * can be satisfied by *any* representation which shows that lasting relief is not claimed";[4]
>
> (2) "[Respondents] may, of course, use the word 'temporary', although the Commission's order *does not require* them to do so";[5] and now
>
> (3) "Respondents can comply by 'merely being accurately true in [their] advertisements,' * * * *i. e., by representing* that Imdrin will give *only* 'temporary and partial' relief.'"[6] [Emphasis supplied.]

It would therefore seem that this language is doubtful and ambiguous.[7] In or out of context, it is susceptible of the

3. *Dolcin Corp. et al.* v. *Federal Trade Commission*, CADC, No. 11700, July 1, 1954. See Brief of Respondents in Opposition, p. 26.

4. Opinion of the Commission (R. 965).

5. Petition for a Writ of Certiorari, p. 15, fn. 10.

6. Brief for Federal Trade Commission, p. 17.

7. "* * * before it can be said that there is no ambiguity, the court must conclude that the controversial words are only capable of one interpretation * * *" *Buchanan* v. *Swift*, 7 Cir., 1942, 130 F. 2d 483, 485.

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interpretation that respondents must use the term "temporary" in their advertising or are excused from so doing. The Court below clearly assumed that use of this objectionable term might be required by the Commission's order and observed that "The word 'temporary' carries an uncertain meaning" (R. 980), "that it might mean only a few minutes." (R. 979).[8] On its part, the Court of Appeals for the District of Columbia Circuit expressed doubt as to what was required to comply with the order, saying:[9]

> "The Commission says that petitioners, in complying with the order as written 'are not required to use the word "temporary". They can comply by merely avoiding the use of such phrases as "prolonged relief".' (Br. 39.) Although the Commission does not say so, like reasoning would seem to permit petitioners to avoid using the word 'minor'. *This* leaves an undesirable ambiguity. * * *" [Emphasis supplied.]

The Commission's vague and vacillating interpretations of how respondents can comply with its order are ineffective to relieve this ambiguity. In *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 340-341, this Court said:

> "The Board however, would construe the order more narrowly than its terms suggest. It says, 'the provision in question, is based upon [a] finding. * * * Read in the context of this finding, the requirement of the cease and desist provisions enjoins petitioner only from continuing to derive benefits * * * [etc.].
>
> "We agree, but the literal language of the order may well be read in quite different meaning, especially

8. The Court below found, however, that: "It was overwhelmingly established in the case at bar that Imdrin affords relief for the pain and discomfort incident to many rheumatic and arthritic conditions. The duration of time that such relief was afforded differed with individuals who used Imdrin. * * *" (R. 980.)

9. *Dolcin Corp. et al.* v. *Federal Trade Commission*, CADC, No. 11700, July 1, 1954. See Br. of Resp. in Opp., p. 26.

> when separated from findings and standing alone in the Court's enforcement order. It then becomes the language of the Court, and the Court would not be bound to look upon the Board's construction as its own. Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Court's orders are not to be trifled with, nor should they invite litigation as to their meaning. It will occur often enough when every reasonable effort is made to avoid it. * * *"

It is therefore clear that if the word "temporary" were permitted to remain in the Commission's order in this case, especially in view of the Commission's changing attitudes with respect to what is required to comply with this provision, respondents would have "real doubt as to the meaning of the words used by the Commission"[10] and as to what was expected of them to comply with same. It cannot be said that, considered in context, they would understand. Under the language of the Commission's order, the question is: Must respondents use the word "temporary" in their advertising or not? And if they must employ the term as the only means by which they can comply, is it not of "uncertain meaning" and its use unnecessary to the protection of the public?

The Court of Appeals did not confine itself to saying that it "disapproved of the use of the word 'temporary' because of its very uncertain meaning." (R. 980.) In citing with approval its earlier decisions in *Carter Products, Inc.* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821, 826, and *D. D. D. Corp.* v. *Federal Trade Commission*,

10. Cf. Brief for Federal Trade Commission, p. 17.

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7 Cir., 1942, 125 F. 2d 679, 682, it observed (R. 979):

> "We think in the case at bar, as we did in the *D. D. D.* case, that *protection of the public does not require* petitioners to use the word 'temporary' or 'temporarily', and that to require its use would be unfair to the petitioners in representing the truth * * *." [Emphasis supplied.]

In other words, the use of the term "temporary" was unnecessary and undesirable as well as ambiguous.

But the Commission says that its medical experts used the term "temporary" in their testimony, so it must have been apt and meaningful to them. This Court is not here concerned with the terminology used by the medical profession or its understanding of the meaning of words. The important criterion is the net impression the advertisement is likely to make upon the general public. *Chas. of the Ritz* v. *Federal Trade Commission*, 2 Cir., 1944, 143 F. 2d 676, 679; *United States* v. *88 Cases* * * * *Bireley's Orange Beverage*, 3 Cir., 1951, 187 F. 2d 967, 971. Medical experts discussing scientific matters do not necessarily react as members of the general public. The scientific mind, ever mindful of the need for complete accuracy of statement, commonly avoids specificity. Their testimony as to what a drug will do is not to be confused with their opinions as to what an ad would mean to readers.

The Commission says that the term "temporary" does not convey the same meaning as "less than permanent"; that there is a middle area of representation, connoting a period of duration that is more than temporary but less than permanent; and that this is not "hair-splitting".[11] If the Commission feels that the Court's modified order will permit respondents to advertise that Imdrin will afford "prolonged" pain relief, does this not prove that the Commission expects respondents to use the word "tem-

11. Brief for Federal Trade Commission, p. 18.

porary" in their advertisements? Nowhere do they say that the *unmodified* representation that respondents' product will afford just pain "relief" will suffice. Therefore, they expect this admittedly indefinite term to be used. Under the Commission's order, respondents could not advertise, as "was overwhelmingly established in the case at bar that Imdrin affords *relief* from the pains and discomfort incident to many rheumatic and arthritic conditions. The duration of time that such relief was afforded differed with the individuals who used Imdrin." (R. 980.) That is the truth, as found by the Court below, yet respondents could not so represent under the Commission's order, as such representation could not be precisely equated to saying that the relief afforded was "temporary." We submit that the Commission's refusal to consider "not permanent" as the practical equivalent of "temporary" in this case is unwarranted "hair-splitting" and unreasonable administrative action.

Relative terms of doubtful meaning in an order are to be avoided in so far as possible. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 340-341. While their use has not been specifically proscribed, neither does such use fall within any authorized standard of delegation by Congress or within the orbit of reasonable administrative discretion. It is true that the courts have sometimes approved orders which *happened* to contain such relative terms as "temporary", but they have not usually approved of the use of those terms in such orders where objection was made.[12]

12. In *Fairyfoot Products Co.* v. *Federal Trade Commission*, 7 Cir., 1935, 80 F. 2d 684, relied on by petitioner (Br. for F.T.C., p. 19, fn. 7), the only issues before the Court below were the truth or falsity of the advertising and the legal effect of discontinuance of the challenged practices and of an offer of refund to dissatisfied customers. The propriety of including "temporary" in the order was not questioned.

Similarly, In *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Com-*

And in answer to the Commission's assertion that language being what it is, it had no choice but to use the word "temporary" in its order, it is noteworthy that:

(1) On appeal to the Commission from the Initial Decision of the Hearing Examiner, counsel supporting the complaint suggested alternative phraseology acceptable to the Commission (R. 942);

(2) Again, on its petition for rehearing the Commission suggested to the Court below a different amended paragraph 1(c) (R. 984);

(3) The Court of Appeals for the Seventh Circuit found it possible to re-write the offending order in a third way it thought adequate to protect the public (R. 980); while

(4) The Court of Appeals for the District of Columbia Circuit found a fourth method of rephrasing the prohibition satisfactory to itself. (Resp. Br. in Opp. 26-27.)

We submit that our language is not so impoverished that the Commission had no alternative but to employ the word "temporary" in its order. And if the Commission believed its original order in this case appropriate and specific enough for the "particular evils at which it is directed",[13] respondents ask why the Commission, on its

mission, 7 Cir., 1940, 111 F. 2d 889, the sole issues were the truth of the advertising, the question of public interest, and the vagueness of the order in other respects than its employment of the term "temporary."

Again, in *Sebrone Co.* v. *Federal Trade Commission*, 7 Cir., 1943, 135 F. 2d 676, there does not seem to have been any objection to the inclusion of the term "temporary" in the order. The issues were the truth or falsity of the representations and the meaning of the advertisements.

Only in *Concrete Materials Corp.* v. *Federal Trade Commission*, 7 Cir., 1951, 189 F. 2d 359, does the question here involved appear to have been raised, with respect to a waterproofing agent for concrete.

13. Brief for Federal Trade Commission, p. 22.

petition for rehearing in the Court of Appeals, professed willingness that the Court enter an order without a requirement that respondents use the term "temporary" if that Court would restore the prohibitions it had deleted from the Commission's order with respect to relief of "severe" pains and relief of other symptoms of rheumatism and arthritis.[14]

The fact that the Commission may have erroneously required some fourteen manufacturers or sellers of various products to cease and desist from advertising that they would have more than temporary effect[15] should not be controlling in this case. If the Commission is wrong, it should be reversed or its order appropriately modified. This Court has not refused to reverse even where thousands of cases had been differently decided by the administrative agencies or were adversely affected by the Court's decision.[16]

The Court below based its decision in this case on its thinking in its two previous decisions in *D.D.D. Corp.* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679 and *Carter Products, Inc.* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821. The Commission now contends that these decisions were wrong.[17] This is at variance with the position petitioner has heretofore taken. Up to this point, it has urged only that these cases were distinguishable

14. Brief for Federal Trade Commission, pp. 28-29, fn. 17. (R. 984.) Cf. order in *Dolcin Corp. et al.* v. *Federal Trade Commission*, Ibid.

15. Brief for Federal Trade Commission, p. 22, fn. 13.

16. Despite the concurrence of three agencies in the view that back pay was not wages, and despite the fact that more than 30,000 individual employees had been allowed back pay in "closed" cases by the NLRB, the aggregate amount exceeding $7,700,000.00 in the fiscal years 1939 to 1944, this Court set aside the Board's ruling. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 360, n. 4.

17. Brief for Federal Trade Commission, p. 24.

from those in which "temporary" had been allowed in an order, on the basis of the nature of the product involved in each case. (R. 941, 965.)

We respectfully submit that the decisions followed by the Court of Appeals were right in principle and correctly applied. The Court said in both previous cases:[18]

> "[4] We are also of the view that the word 'temporary' as used in Paragraphs 1(a), (b), (c), (e) and (g) of the Commission's order should be eliminated. We see no reason why petitioner should not be permitted to represent its product as a relief for itching. It does not cure either the itch or its cause, but it does afford relief. One of the definitions given by Webster for the word 'relief' is 'lessens evil, pain, etc.' The words '*relief* from itching' could, in our minds, *carry no implication to the public that the product was a permanent cure* either for the symptoms or the disease. The word 'temporary' carries an uncertain meaning. As the Commission's doctor stated: 'It might mean a few minutes, or an hour or so.' To require its use would serve no purpose in the protection of the public, but might limit petitioner in truthfully representing its product."[19]

It is not correct to say that only a majority of the Court of Appeals believed that the word "relief" carried no implication to the public that the product was a permanent cure for the symptoms of the disease.[20] The entire Court, including the dissenting judge, agreed on this point.[21] Mr. Justice Minton thought only that the relief afforded could be more accurately described by employment of the ad-

18. 125 F. 2d 679, 682 and 186 F. 2d 821, 826.

19. Even Judge Minton, now Mr. Justice Minton, dissenting in the *D.D.D.* case, *supra*, agreed that: "I do not believe the word 'relief' means permanent relief alone * *." (Opin. p. 682.)

20. Brief for Federal Trade Commission, p. 23.

21. See footnote 19.

mittedly uncertain term "temporary."[22] We cannot appreciate how the use of the term "temporary" with respect to relief of pain, in respondents' advertisements, would better inform a prospective purchaser of the drug of its limitations than a simple claim to "relief" alone, but it might tend to confuse him as to the duration of the relief afforded and arouse doubts sufficient to deter his purchase.

In any event, there is nothing in the foregoing which detracts from the proposition that "temporary" is a relative term of uncertain meaning. The Commission admits it.[23] It contends only that the Court below was "wrong" in deleting from the Commission's order an indefinite term, capable of conveying an erroneous impression to the purchasing public, so long as the order in question makes known "with reasonable specificity the acts which the respondent is to do or refrain from doing."[24] It does not follow from the fact that a respondent may have been told with reasonable specificity what he can say in an advertisement, and so is enabled to comply with the order, that the language he is obliged to use may not convey an erroneous impression to readers. Neither *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426 nor *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, cited by petitioner, are apposite. In so far as these cases announce the doctrine that reasonable specificity in a Commission's order is all that is required, we

22. Ibid. "We think that neither the purpose nor the terms of the act are so broad as the encouragement of the informative function [of advertising]. Both purpose and terms are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority." *Alberty* v. *Federal Trade Commission*, CADC, 1950, 182 F. 2d 36, 39 [3, 4].

23. Brief for Federal Trade Commission, p. 18.

24. Brief for Federal Trade Commission, p. 23.

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have no quarrel with that general proposition, but it is not equivalent to saying that ambiguous orders *are* reasonably specific. In the *Express Publishing Co.* case, this Court, after stating that an injunctive order must be reasonably specific, found the Board's order too broad. In the *Cement Institute* case, it found that when the prohibitions of the order were read in the light of its preamble, they were sufficiently specific to apprise respondent of the requirements for compliance. Neither case shows how a prospective buyer of Imdrin would know that "temporary" pain relief did not mean for a few minutes only, or that the product would provide relief of greater duration to many persons.

In view of the foregoing, it is clear that the Court of Appeals correctly decided that the Commission's order was vague and uncertain enough to require modification.

II.

THE COURT OF APPEALS PROPERLY MODIFIED THE COMMISSION'S ORDER BY RE-WRITING IT IN THE MANNER IT DID IN THIS CASE.

It is petitioner's further contention that even if its order was so ambiguous as to require modification, the Court below could not properly re-write it in a way that substantially reduced the scope of the relief prescribed by the Commission.[25] This contention is likewise without merit.

Respondents can agree that the Commission has discretion in the choice of a remedy deemed adequate to cope with the unlawful practices found to exist, *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611, and that the statutory scope of judicial review is limited to ascertaining whether the Commission made an allowable judgment in its choice of a remedy, Ibid, p. 612. But re-

25. Brief for the Federal Trade Commission, p. 22.

spondents show that the problem of ascertaining what sanction to invoke "is a question [only] initially" for the Commission. Neither the statute nor this Court's interpretation of it were meant to bar review of the Commission's selected remedy or to prohibit modification of the Commission's order. The Commission concedes that the "courts will * * * interfere * * * where the remedy selected has no reasonable relation to the unlawful practices found to exist."[26] *Siegel* case, *supra*, p. 613.

Petitioner's misconception stems from its fallacious assumption that there is an inflexible "rule prohibiting a reviewing court from substituting its judgment as to the remedy for that of the responsible administrative agency."[27] In the *Siegel* case itself, this Court substituted its judgment for that of the agency, although it did not re-write the Commission's order. It was the agency's intention to prohibit petitioner's use of its trade name, but this Court thought such action unduly harsh and expressed doubt whether the ends of the act might not be satisfied and the trade name at the same time saved. Ibid., p. 613.

The courts' reluctance to interfere with administrative discretion in the remedies chosen by the agency is not inflexible. *National Labor Relations Board* v. *National Biscuit Co.*, 3 Cir., 1950, 185 F. 2d 123, 124; *Alberty* v. *Federal Trade Commission*, CADC, 1950, 182 F. 2d 36, cert. den. 340 U. S. 818. This Court has substituted its judgment for that of administrative agencies on numerous occasions. *U. S.* v. *Carolina Freight Carriers*, 315 U. S. 475, 490; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144; *Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 326 U. S. 446; *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624; *Securities and Exchange Commis-*

26. Brief for the Federal Trade Commission, p. 27.
27. Brief for the Federal Trade Commission, p. 30.

sion v. *Central Illinois Securities Corporation*, 338 U. S. 96; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143. Such substitution of judgment has been with respect to the remedy chosen by the Commission. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441. See also: *Gt. Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291; *Board of Governors* v. *Agnew*, 329 U. S. 441; *U. S .v. Silk*, 331 U. S. 704; *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722.

In *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, the Commission found that the Eastman Company, for the purpose of maintaining its monopoly, acquired three laboratories. It ordered that the Company should sell same to disinterested third parties. This Court substituted its judgment for that of the Commission, with respect to the Commission's choice of a remedy. It affirmed the decree of the Court of Appeals setting aside the order in so far as it required the company to sell its laboratories.

Similarly, in *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441, this Court in effect completely re-wrote the Commission's cease and desist order which prohibited respondent from carrying out a plan of resale of its products.[28] The modification materially changed the scope of the relief the Commission believed necessary to cope with the evil found to exist. The Court substituted its judgment for that of the "responsible" agency, with respect to the remedy so selected, and properly so. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; 15 U. S. C. § 45(c); and see *Folds* v. *Federal Trade Commission*, 7 Cir., 1951, 187 F. 2d 658, 661

28. Cf. the original order of the Commission, 257 U. S. 441, 444, fn. 1, with the order approved by the Court, Opin. pp. 455-456.

[3] and *Carter Products, Inc.* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821, 826 [4, 5].

And in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, relied on by petitioner, this Court reversed the Commission's order requiring the excision of petitioner's trade name, the remedy prescribed by the Commission. The Court said it was "left in the dark" whether a less drastic order would suffice and was "not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made." In our case, the Commission has already considered and rejected a less harsh remedy (R. 964-965), so the Court may now pass on the rational basis, if any, for such allowable judgment. The decision of the Court of Appeals in the *Siegel* case was predicated on its belief that it was not "still in control of the remedy." (150 F. 2d 751, 756 [7].) This Court reversed.

There have been numerous cases since the *Siegel* case, *supra*, in which this Court has substituted its judgment for that of an administrative agency.[29] Many courts of appeal have done the same.[30]

Since the *Siegel* case, this Court denied certiorari in *Federal Trade Commission* v. *Alberty*, 340 U. S. 818, where the same question was raised. The Court of Appeals for the District of Columbia Circuit materially altered the scope of the cease and desist order issued by the Commis-

29. *Securities and Exchange Commission* v. *Central Illinois Securities Corp.*, 338 U. S. 96; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143 (substitution in part); *Board of Governors* v. *Agnew*, 329 U. S. 441; *U. S.* v. *Silk*, 331 U. S. 704; *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722; *Social Security Board* v. *Nierotko*, 327 U. S. 358.

30. *Alberty* v. *Federal Trade Commission*, D. C. Cir., 1950, 182 F. 2d 36, Cert. den. 340 U. S. 818; *Folds* v. *Federal Trade Commission*, 7th Cir., 1951, 187 F. 2d 658.

sion against the respondent, a food and drug manufacturer, substantially reducing the scope of the relief prescribed by the Commission.[31] *Alberty* v. *Federal Trade Commission*, D. C. Cir., 1950, 182 F. 2d 36. As a reason for granting the writ, petitioner stated that:[32]

> "The decision below is also in conflict with applicable decisions of this Court defining the limits of judicial review of the Commission's determination of the remedy requisite to prevent continuation of prior illegal practices. The controlling principles were clearly laid down in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608. * * *"

Nevertheless, this Court declined to grant the writ. The only difference between the *Alberty* case and that at bar was that in the former, the Court of Appeals quoted the rule from the *Siegel* case that courts will interfere only "where the remedy selected has no reasonable relation to the unlawful practices found to exist" and expressly held that it bore no such reasonable relation,[33] while in our case, the Court of Appeals did not make any such express finding of lack of "rational basis." However, respondents believe that such a finding is implicit in the findings of the Court below that the inclusion of the word "temporary" in the Commission's order was "unnecessary" and "ambiguous". (R. 979.)

In *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 127-128, this Court said:

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31. For the extent of the modification, see 182 F. 2d 36, 37, 40 [5]. The Court excused the advertiser from representing not only that their drug product was of benefit only when the condition treated arose from a given cause, but also *that such cause existed infrequently.*

32. Petition for Certiorari, No. 131, Oct. Term 1950, p. 18.

33. 182 F. 2d 36, 39.

> "Even within the latitude allowed by our present *ruling for the play of the Commission's judgment*, it remains to consider whether in this case the Commission has complied with the statutory standards * * *."

The Court substituted its judgment for that of the Commission on each question of the meaning of "fair and equitable", something which it had refused to do in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 208.[34] The difference in the scope of review in these cases "does not lie in the distinction between generalizing and particularizing. * * * Neither case involved analysis of legislative history. Both cases involved problems within the SEC's special field of competence but not so technical as to be beyond the range of quick judicial grasp.[35] The best explanation may be in terms of *judicial discretion.*" Davis, "Administrative Law", 1951, p. 891. [Emphasis supplied.] Respondents believe the Court below had, and this Court on review, has judicial *discretion* to substitute its judgment for that of the agency in any case in which it believes the agency action lacks "rational basis."[36] Proceedings for relief injunctive in nature are

34. Cf. also: *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 with *Gray* v. *Powell*, 314 U. S. 402; *Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 326 U. S. 446 with *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; and see *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143. (Substitution of judgment as to one part of order and refusal to do so as to the other.)

35. As to comparative qualifications of courts and administrative agencies, "Courts are masters of * * * non-technical words * * * [e. g. 'temporary']." Davis, "Administrative Law", 1951, p. 896. And cf.: "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." Brandeis, J., in *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S. 285, 291.

36. "Not only is the margin for judicial discretion wide in making the choice between substitution of judgment and use of "rational basis" test, but once that choice has been made the reviewing court again exercises a broad discretion in determining for the particular case the meaning of substituted judgment." Davis, "Administrative Law", 1951, §252, p. 908.

essentially equitable and, whether pursuant to statute or otherwise, contemplate that the court shall have residual discretion. Cf. *Hecht & Co.* v. *Bowles*, 321 U. S. 321, 329.

It is therefore necessary to determine whether or not there was such "rational basis" for the Commission's choice of a remedy as will support an "allowable judgment." At first blush, it would appear that any sanction which would prevent a violative practice found to exist bears a reasonable relation thereto; but on closer inspection, this appears to be an over-simplification. The Commission here contends that: "Patently the order here has a 'reasonable relation to the unlawful practices found to exist'; in plain terms it prohibited those very practices."[37] But it is fundamental that "the orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public * * *." *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217. The Commission here knew that respondents objected to the inclusion of the term "temporary" in the order because it was unnecessary and of uncertain meaning. (R. 964.) The Commission declined to omit the word, assigning as its so-called *reason* therefor that (R. 964):

> "The Commission is of the opinion that advertising claims should *always* be so limited where only temporary relief is afforded unless by the very nature of the claim, there is no danger of deception. The danger of deception in this case lies particularly in the fact that respondents desire to represent that their preparation will afford *relief from pains due to a particular cause*, namely pains of arthritis and rheumatism. *By limiting the type of pain relief claimed, respondents imply that a lasting relief will be achieved* by eliminating the cause of the pain. * * * The Commission, *therefore*, is of the opinion that the inclusion of the word 'temporary' * * * is necessary." [Emphasis supplied.]

37. Brief for the Federal Trade Commission, p. 27.

The Court below disagreed with the Commission, holding that this part of the order was not necessary. The Court said: "We think * * * that protection of the public *does not require* petitioners to use the word 'temporary' * * * and that to require its use would be unfair to the petitioners in representing the truth * * *." (R. 979.) The Court below (and the Court of Appeals for the District of Columbia) also held that the term "temporary" is uncertain and ambiguous. In so doing, both courts have, in a sense, substituted their respective judgments for that of the Commission, but only to test the reasonableness of the Commission's action. By analogy, while a court may not weigh the evidence in a jury trial, it can consider that evidence to determine whether it would support a verdict.

The Commission's order was not reasonable or necessary. It is submitted that it does not follow, as recited in the above excerpt from the Commission's opinion, that a claim to relief of the pain of a particular condition, such as arthritis, imports more lasting relief than a claim to pain relief generally, or that the use of the word "temporary" in a cease and desist order is "therefore" required. The Court below found that:

> "The words 'relief from itching' *could*, in our minds, carry no implication to the public that the product was a permanent *cure* either *for the symptoms* [*e.g.* pain] or the disease."

So the Court found not only that it disagreed with the Commission, on the point, but that it believed that reasonable minds could not differ with respect thereto.

But even if the Commission were right as to the impression the public would derive from the words "relief of the pains of arthritis", it does not follow that any order that will prohibit such representation will be reasonable. The Commission here takes its usual position that its orders

must possess complete and unqualified restraint in all events. This Court has rejected that contention. It should be remembered that in the *Siegel* case, *supra,* the Commission in its Brief, pp. 20, 21 and 22, similarly urged:

> "The Commission, with its valid finding before it, was entitled to conclude that nothing short of prohibition of the term 'Alpacuna' would give assurance of preventing the deception springing from the use of this name. * * * '* * * If the Commission's orders are to possess any vitality, *the restraint must be complete and unqualified.* * * *' "

But this Court reversed because it was not satisfied that the ends of the act could not be effectuated without the imposition of a remedy so drastic, harsh and burdensome.

From this we see that an allowable judgment as to the choice of a remedy must be subjected to the test of logical inference; but that alone will not be determining. Since the use of the trade name was a practice complained of as misleading, it would have been entirely logical, upon a finding that such representation was deceptive, to proscribe the use of that term, and the Commission elected to do so. But this Court refused to consider the Commission's judgment "allowable."

So too, in our case, the inadequacy of milder remedies must appear. The Court below thought it would suffice to effectuate the purposes of the act if respondents were restrained from claiming that Imdrin afforded permanent pain relief; that such a prohibition coupled with "the five sections of the order which we approve[38] will very largely

38. "It is ordered that the respondents * * * cease and desist from * * *

1. Disseminating * * * any advertisement which represents * * *

(a) that the taking of said preparation will constitute an * * * effective * * * treatment for * * * any * * * kind of arthritic or rheumatic condition;

correct the misleading and deceptive representations which petitioners have made in their advertisements." 208 F. 2d 382, 388.

As pointed out in our Brief in Opposition, pp. 18-20, and in our Memorandum in Rejoinder, p. 3, the Commission's order, as modified by the court below, *sufficiently* preserves the Commission's justifiable intent to protect the public. It need not afford complete and unqualified restraint at all costs. It will prevent respondents' claiming that Imdrin is an effective treatment or cure for any kind of arthritis or rheumatism, will afford any permanent relief of the pains thereof or effect a cure of the symptoms, is a sensational new scientific discovery, will enable afflicted persons to resume their normal habits or occupations or will have any therapeutic effect upon the enzyme systems of the blood or bones. It will not prevent respondents' representing that Imdrin will relieve "severe" pains. In the Court below, respondents urged that "severe", with reference to pain, be deleted from the order.[39] The Court complied with the request and struck the term, but gave no reason for so doing. Presumably the Court felt that this term, like "temporary", was relative, ambiguous, of uncertain meaning and undesirable and unnecessary in the order. Respondents may also claim their

(b) that said preparation * * * will cure * * * any * * * arthritic * * * condition;

(c) that said preparation will afford any permanent relief of * * * pains * * * of any * * * arthritic * * * condition, or effect a cure of the symptoms or manifestations of any such condition; [as modified]

(d) that said preparation * * * is a sensational new discovery of scientific research, * * *;

(e) that persons afflicted with * * * any * * * arthritic condition * * * will be enabled * * * to resume such normal habits * * *;

(f) that the taking of said preparation will have any therapeutic effect upon the * * * enzyme systems * * *."

39. Brief of Petitioner for Review in Court of Appeals, p. 72.

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preparation affords "prolonged" relief, if they so desire, under the modified order; but the alternative, if respondents were forced to use the term "temporary", would be to deny them the right to truthfully represent that Imdrin will relieve pain, the duration of such relief varying with individuals. Such advertisements would allow a substantial number of potential customers to suppose the duration of relief incredibly short. Similarly, respondents are left free to say, if they so desire, that Imdrin will relieve arthritic stiffness or swelling. But there is no charge that they ever made such claim (R. 954, Par. 2). What the Commission charged was that respondents said Imdrin was an "effective treatment" for those symptoms or manifestations. If respondents were to claim that Imdrin will "stop" swelling or stiff joints, the Commission would immediately insist that respondents were advertising a "cure of the symptoms" of rheumatism and arthritis (*D. D. D. Corp.* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679, 682), something which is prohibited by the modified order (R. 980, Par. 1(c)).

It would therefore appear that in the main, the Court's modified order preserves the Commission's justified intent. Insistence upon anything more than that is quibbling. With all due respect to the Commission's views to the contrary, there has been no *substantial* reduction in the scope of the relief prescribed by the Commission, except in those areas where substantive change was required.

The Commission further contends that unless the Court below could draft an adequate substitute for the Commission's order, it could not re-write the order,[40] however bad. Petitioner cites no authority for this statement, and we are unable to find any. It concedes, however, that this supposed rule is inapplicable to cases where the order is

40. Brief for Federal Trade Commission, p. 28.

without "rational basis". We believe this is such a case and that the Court of Appeals implicitly so found. And we know of no rule which requires the remand to the Commission for further study of all its orders with which the reviewing court cannot agree. Where the agency has rejected for what the Court considers insufficient cause a less drastic remedy of substantially equal effect, we think that Congress, by conferring on the courts the power to modify agency orders, meant to short-cut a theoretically interminable process of repetitive remand and review by making the Court the final draftsman.[41] Any other interpretation would unduly confine the court's statutory power of modification to trivial cases of form and invest the agency with the ultimate power of review. Patently, Congress did not intend to so circumscribe the Court's power.

Respondents cannot believe that this Court meant to limit the application of the rule in the *Siegel* and *Eastman Kodak* cases to situations where the Commission orders the abandonment of a valuable trade name or the disposition of physical real property. It stated no such limitation, and the *Beech-Nut* case entailed no such loss of property, tangible or intangible. There, as here, all that was involved was a sales plan, in the one case a course of dealing with buyers, in the other a course of advertising. These are not distinguishable in principle. Both represent valuable vested property rights upon which the successful conduct of the businesses in question depend. Neither gives license to violate the law.

There is an inclination to view with suspicion all nostrums and drug preparations for self-medication. These

41. *Note* that after the decision below, the Commission undertook to redraft its original order in conformity with what it believed to be the Court's views (R. 984), but the Court rejected the amended order as well. This process could be continued *ad infinitum*.

products serve a useful purpose in ministering to the needs of many persons who cannot afford individualized medical treatment. There is a similar unwarranted tendency to view with disfavor many attempts to market legitimate and beneficial commodities through the media of advertising, but advertising as such, far from opposing public policy, contributes substantially to the national economy. It should be remembered that Imdrin is a meritorious product; that "it was overwhelmingly established in the case at bar that Imdrin affords relief for the pain and discomfort incident to many rheumatic and arthritic conditions." (R. 980.) There is no claim that the preparation is injurious. The only criticism of the Court of Appeals was that respondents' claims were exaggerated. We sincerely believe that the order of the Court below will curb all undue exaggeration without unnecessarily curtailing respondents' efforts to market their product by truthful advertisement. We venture that not a single person will be misled or deceived by the modified order.

CONCLUSION.

In consideration of the premises, it is respectfully requested that the order of the Court of Appeals of the Seventh Circuit be affirmed.

Respectfully submitted,

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